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Supreme Court, U.S.
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No. 88-1234

In The

Supreme Court of the United States

October Term, 1988

UNITED SERVICES AUTOMOBILE ASSOCIATION, AN UNINCORPORATED ASSOCIATION,

Petitioner,

v.

LEROY TUCK, Administrator of The Estate of JOHNNY L. TUCK, Deceased, LEROY TUCK, AN INDIVIDUAL AND DOROTHY TUCK, AN INDIVIDUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF THE CASE

The Respondents initiated this action to recover uninsured motorist insurance benefits and damages for breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress against United Services Automobile Association. The claim arose out of the death of the son of Mr. and Mrs. Tuck, Marine Corps Captain, Johnny L. Tuck, who died in a rear-end automobile collision at the hands of a speeding, intoxicated car thief bent on committing suicide.

After United Services Automobile Association (hereinafter referred to as "USAA") failed to pay any uninsured motorist benefits, Respondents filed suit. The Complaint, as amended, the Answers, Pre-Trial Order and Exhibits introduced at trial established that Plaintiffs were citizens of Oklahoma and that USAA was a foreign corporation with its principal place of business in San Antonio, Texas. USAA did not contest diversity of citizenship and admitted it was a corporation. The case proceeded to trial upon the jurisdictional basis of diversity of citizenship. At trial, the jury returned a verdict for $900,000.00 for the policy limits under the uninsured motorist coverage, damages for bad faith and intentional infliction of emotional distress.

Respondent LeRoy Tuck's, Administrator of the Estate of Johnny L. Tuck, Deceased, only claim at trial was to the uninsured motorist benefits which USAA paid after judgment was entered.

After entry of the judgment and denial of USAA's post-trial motions and commencement by it of the appeal,

USAA revealed it was not a corporation, but was an unincorporated association with members in Oklahoma. USAA requested that the judgment be vacated and the action be dismissed pursuant to *Baer v. USAA*, 503 F.2d 393, Second Cir. 1974.

After USAA's revelation, Respondents discovered that USAA had been participating in a number of diversity actions as either a plaintiff or as a defendant, despite the fact that it had members in the states where the cases were filed. See, *USAA v. Royal Globe*, 511 F.2d 1094 (Tenth Cir. 1975); *USAA v. Glen Falls Insurance Company*, 429 Fed. Supp. (DC CT 1976); *Hoffman v. USAA*, 671 Fed. Supp. 922 (D CT 1987); *Moore v. USAA*, 819 F.2d 101 (5th Cir. 1987); *Allen v. USAA*, 668 Fed. Supp. 1242 (WD WI 1987); *Feliciano v. United Services Automobile Association*, 646 F.2d 695 (First Cir. 1981); *Boardman v. USAA*, 768 F.2d 718 (Fifth Cir. 1985); *Boardman v. USAA*, 808 F.2d 1147 (Fifth Cir. 1987) and *Boardman v. USAA*, 742 F.2d 847 (Fifth Cir. 1984). *Oliney v. Gardner*, 771 F.2d 856 (Fifth Cir. 1985) and *USAA v. Cregor*, 617 Fed. Supp. 1053 (DC IL 1985). Only four months before *Tuck v. USAA* went to jury trial, USAA's practice of belatedly contesting diversity jurisdiction was characterized in a written opinion of one United States District Judge as a "*self-serving abuse of the Federal Courts.*" *Neil v. United Services Automobile Association, et al.*, Civil Action 83-2414 United States District Court of Massachusetts, Slip Opin. February 15, 1984.

Indeed, even after it filed its motion to dismiss in its appeal to the Tenth Circuit in *Tuck v. United Services Automobile Association*, 859 F.2d 842 (Tenth Cir. 1988),

USAA continued to participate as a corporation in diversity actions in other courts. While it argued its motion to dismiss to the Tenth Circuit, USAA, as a plaintiff, prosecuted a declaratory judgment action claiming to be a diverse corporation in *United Services Automobile Association v. Weappa,* (N.D. Alabama CV 86-AR 5072 NW).

On appeal, Respondents moved to amend the pleadings to establish subject matter jurisdiction. The Tenth Circuit declined to rule upon any such amendment, but also declined to dismiss the case remanding it back for the trial court to see if the jurisdictional defects could be remedied by proper amendment. The Tenth Circuit also instructed the District Court to consider the need for sanctions if there was no way to properly amend the pleadings.

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ARGUMENT AND AUTHORITIES

INTRODUCTION

The Petitioner does not advance any justifiable reason for the Supreme Court of the United States to grant certiorari at this time.

First, the Tenth Circuit properly exercised its power of appellate review by remanding the case for consideration of amendments.

Second, the Petitioner is premature in anticipating the character of any action which the District Court and the Tenth Circuit may permit. The District Court has not ruled upon any proposed amendments or sanctions. The Tenth Circuit declined to rule upon any amendments. No

sanctions have as yet been imposed. Anticipating the basis and nature of the District Court's rulings and the Tenth Circuit's rulings on any proposed amendments and sanctions would be prematurely anticipating the nature of this controversy.

———o———

PROPOSITION ONE

THERE IS A CLEAR FEDERAL COMMITMENT TO ALLOW THE RELATIONSHIP BACK OF AMENDMENTS DROPPING PARTIES IN ORDER TO PRESERVE SUBJECT MATTER JURISDICTION

This principal covers not only cases involving technically misjoined parties but also cases involving parties properly joined as a procedural matter, but whose presence will cause a defect in subject matter jurisdiction: 3(a) *Moore's Federal Practice*, paragraph 21.03(2).

While Rule 12(h)3 of the Federal Rules of Civil Procedure provides that "*where it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action*", it is provided by 28 USC Sec. 1653 that defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Furthermore, Rule 21 of the Federal Rules of Civil Procedure provides that "*misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.*" Petitioner mis-

characterizes the opinion of the Tenth Circuit. The opinion does not direct the amendment of Plaintiff's action and it does not direct the District Court to change the subject of the action. The opinion only requires the District Court to determine whether an amendment is possible within the confines of Federal Rules of Civil Procedure 15, 19 and 21.

There does not exist any conflict between the circuits as Petitioner claims.

The Third Circuit does not follow the position Petitioner suggests it does. The Third Circuit's position as stated in *Publicker Industries v. Roman Ceramics Corp.*, 603 F.2d 1065 (Third Cir. 1979). The Court stated that *"the court may dismiss a nondiverse party in order to achieve diversity even after judgment."* *Id.* at 1069.

Contrary to Petitioner's suggestion, this view was affirmed in *Field v. Volkswagenwerk A.G.*, 626 F.2d 293 (Third Cir. 1980). There the Third Circuit held that the authority of a district court to drop nondiverse parties whose presence is not essential to the suit in order to preserve and perfect its diversity jurisdiction is well established. *Id.* at 296 citing *Horn v. Lockhart,* 84 US (17 Wall.) 570, 21 L.Ed 657 (1873). *Field, supra,* dealt with a nondiverse plaintiff attempting to substitute in its place a diverse claimant as a diverse plaintiff.

The Fifth Circuit's position is set out in *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (Fifth Cir. 1953) cert. den. 347 US 912, 98 L.Ed 1069, 74 Sup.Ct. 476. *Finn* involved a situation where the Fifth Circuit directed the District Court to enter judgment upon a jury verdict rendered against two diverse defendants and one nondiverse

defendant after dismissing the nondiverse defendant. *Finn* was previously before the United States Supreme Court. See, *American Fire & Casualty Co. v. Finn,* 341 US 6, 95 L.Ed 702, 71 Sup.Ct. 534 (1951). There the Supreme Court reversed and remanded the case but did not preclude an amendment to dismiss the non-resident defendant and enter judgment upon the old verdict. 95 L.Ed. 711 at Note 18. In fact, at Note 18 the Supreme Court specifically stated that the propriety of such an amendment ". . . *and like matters are for the consideration and decision of the District Court* [*citations omitted*]".

The Fifth Circuit case cited by Petitioner is not on point. *Aetna Casualty & Surety Co. v. Hillman,* 796 F.2d 770 (Fifth Cir. 1986) involves a diverse plaintiff who sought to substitute a nondiverse claimant as a diverse plaintiff. The Court stated that plaintiff sought to substitute another plaintiff, a totally different person, in its place to achieve diversity. The Court added *"a district court may drop a nondiverse party whose presence is not essential to the suit to preserve and perfect diversity jurisdiction". Id.* at 774. The other Fifth Circuit case cited by Petitioner is not on point. There was no request in any of the cases cited by Petitioner to amend the allegations to drop a nondiverse party to cure any jurisdictional defect and there was no discussion about any amendments such as may be potentially involved in *Tuck v. USAA, supra.* See, *Oliney v. Gardner,* 771 F.2d 856 (Fifth Cir. 1985); *Boelens v. Redman,* 759 F.2d 504 (Fifth Cir. 1985); *Gaines v. Dixie Carriers, Inc.,* 435 F.2d 52 (Fifth Cir. 1970).

The Eighth Circuit does not support Petitioner's position. *Shows v. Harber,* 575 F.2d 1253 (Eighth Cir. 1978)

held that a plaintiff should be granted leave by the district court to establish diversity jurisdiction by dropping nondiverse defendants. The case relied upon by Petitioner, *Kansas-Nebraska Natural Gas Co. v. City of St. Edward, Nebraska,* 234 F.2d 436 (Eighth Cir. 1956) is not on point. That case did not address the issue of whether a nondiverse party may be dropped to achieve subject matter jurisdiction. It only held that where there was no diversity, there was no subject matter jurisdiction and the case should be dismissed. There was no treatment of 28 USC Sec. 1653 or Federal Rule of Civil Procedure 21.

The Ninth Circuit firmly stands for the proposition that a dispensable nondiverse party may be dismissed after judgment has been entered in order to perfect retroactively the District Court's original jurisdiction. See, *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.,* 819 F.2d 1519 (Ninth Cir. 1987).

Petitioner suggests that *Rockwell International Credit Corp. v. United States Insurance Group,* 823 F.2d 302 (Ninth Cir. 1987) is supportive of its position. This suggestion is misplaced. The Ninth Circuit specifically stated there that the "*proposed amendment is not merely the technical dismissal of a nonessential, nondiverse party*", *Id.* at 304. Instead the amendment sought to substitute a diverse claimant who was not a real party in interest in the place of the plaintiff who brought the action.

Since the matter of amendments in *Tuck v. USAA, supra,* is properly before the District Court, (*American Casualty & Surety Co. v. Finn, supra,* at Note 18) and since there is no conflict between the circuits, the Petitioner's Request for a Writ of Certiorari should be denied.

PROPOSITION TWO

PETITIONER'S ARGUMENT TO THIS COURT TO ISSUE ITS WRIT OF CERTIORARI BASED UPON THE POSSIBILITY OF SANCTIONS BEING IMPOSED IS PREMATURE. FURTHERMORE, CONSIDERATION OF SANCTIONS IN THIS ACTION IS APPROPRIATE.

Petitioner's arguments concerning sanctions are misplaced. Courts may properly assess sanctions as an exercise of inherent power necessary to the exercise of all others, *Roadway Express, Inc. v. Piper* 447 US 752, 765; 100 Sup.Ct. 2455 at 2463; 65 L.Ed.2d 488 (1980). In *Roadway, supra,* the Supreme Court stated that it recognized the inherent power of a court to levy sanctions in response to abusive litigation practices.

See also, *Basso v. Utah Power & Light Company,* 495 F.2d 906 (Tenth Cir. 1974); *Moulton v. Commissioner of Internal Revenue,* 733 F.2d 734 (Tenth Cir. 1984); *Eash v. Riggins Trucking, Inc.,* 757 F.2d 557 (Third Cir. 1985); Federal Rule of Civil Procedure 11. USAA knows it is an unincorporated association. Yet, from the reported cases, it has misrepresented itself to be a corporation. This misbehavior was particularly egregious in *Tuck v. USAA, supra,* where it waited until it lost a jury trial and post-trial motions before coming from "behind the log" in an attempt to thwart justice.

Given the abusive practices of USAA, the District Court is well within its authority to consider sanctions.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

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